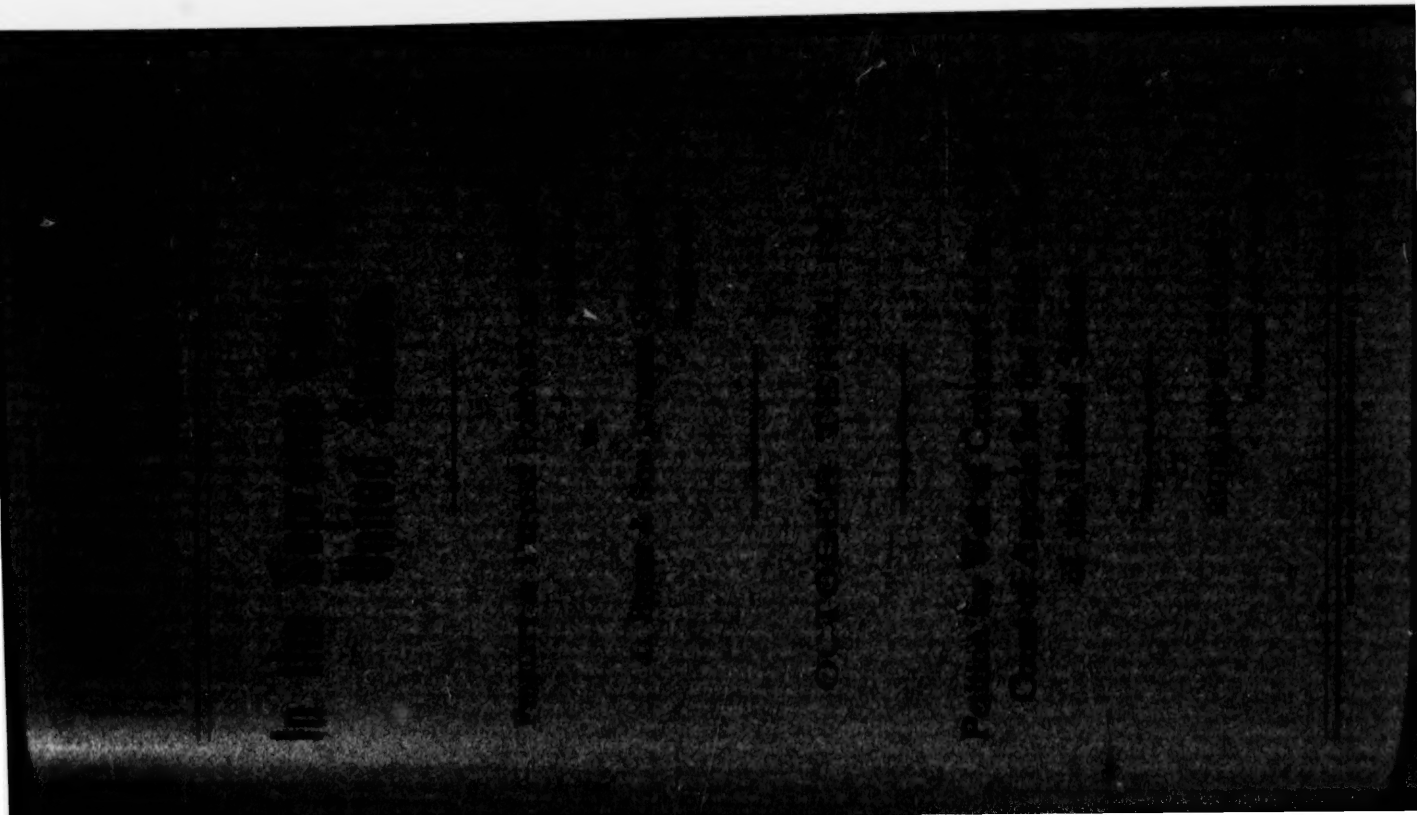


In the Supreme Court

OF THE

UNITED STATES.

Fidelity & Deposit Company of Maryland,
Petitioner,
vs.
L. Bucki & Son Lumber Company,
Respondent.

H. Bisbee, Esq., attorney for the L. Bucki & Son Lumber Company, will please take notice that on Monday, January 6th, 1902, or as soon thereafter as counsel can be heard, I shall present the following petition to the Supreme Court of the United States, praying that a writ of certiorari may issue to the Circuit Court of Appeals for the Fifth Circuit of the United States, requiring that Court to send up the record of the judgment and proceedings in the case of the L. Bucki & Son Lumber Company *versus* the Fidelity & Deposit Company of Maryland, lately pending on writ of error in the Circuit Court of Appeals, for inspection and review by the Supreme Court, and that at the same time I shall present to the Court a certified copy of the record of said cause, and ten copies thereof, in conformity to the rules of the Supreme Court.

RICHARD H. LIGGETT,
Attorney for Petitioner.

Received copy of the foregoing notice, and of the petition, this 23rd day of December, 1901.

.....
Attorney for Respondent.

IN THE SUPREME COURT OF THE
UNITED STATES.

Fidelity & Deposit Company of Maryland,
Petitioner,
vs.
The L. Bucki & Son Lumber Company,
Respondent.

Petition for writ of Certiorari, requiring the Circuit Court of Appeals for the Fifth Circuit of the United States to certify to the Supreme Court for its review and determination the case of the L. Bucki & Son Lumber Company, Plaintiff in Error, *versus* the Fidelity & Deposit Company of Maryland, Defendant in Error.

STATEMENT OF CASE.

The petitioner, the Fidelity & Deposit Company of Maryland, hereinafter designated the "Fidelity Company," respectfully shows unto this honorable Court as follows:

The action of the L. Bucki & Son Lumber Company, respondent, hereinafter designated the "Bucki Company," was originally instituted against your petitioner in the Circuit Court for Duval County, Florida, and thereafter removed to the United States Circuit Court for the Southern District of Florida by your petitioner.

This action was founded upon two attachment bonds, one for $20,000 and the other for $150,000, executed by the petitioner as surety in two proceedings in attachment instituted by the Atlantic Lumber Company against the L. Bucki & Son Lumber Company in the Circuit Court for Duval County, Florida, on October 1st, 1897, and which were afterward removed into the United States Circuit Court for the Southern District of Florida by the said Bucki Company. These bonds were payable to the Bucki Company, and conditioned for the "payment of all costs and damages which it

might sustain in consequence of said attachments being improperly sued out."

A brief history of these two attachment suits is as follows: On the 1st day of October, 1897, the Atlantic Lumber Company commenced two different actions against the Bucki Company in the Circuit Court for Duval County, Florida, and as ancillary to one of said actions, it sued out an attachment for $9,980.80, and gave an attachment bond for $20,000, and in the other of said suits sued out a writ of attachment for $75,000, and filed an attachment bond for $150,000.

These attachment proceedings, as above stated, were subsequently removed into the United States Circuit Court for the Southern District of Florida, where the writs of attachment were dissolved on the ground that they had been improperly sued out.

Soon after the dissolution of these writs of attachment, the Bucki Company instituted this action against your petitioner, the Fidelity Company, in the Circuit Court for Duval County, Florida, which suit your petitioner afterward removed to the United States Circuit Court for the Southern District of Florida.

This action went to trial on the plea of non damnificatus, and the Court permitted the Bucki Company to introduce evidence concerning the employment of attorneys to secure the dissolution of the attachment, and in that action instructed the jury as follows:

"In making up your verdict, you will find and assess the total amount of damages the plaintiff has sustained, exclusive of reasonable attorneys' fees for services rendered by the plaintiff's attorneys in preparing for, and on the trial of the motions to dissolve the two writs of attachment; and in addition to the amount so found, you will also find and assess separately such sum of money as upon the evidence you believe to be a reasonable compensation for the services rendered

by the plaintiff's attorneys in preparing for the trial of, and on the trial of the two motions to dissolve the attachments, and in resisting the efforts of the Atlantic Lumber Company to have the judgment dissolving such attachments reversed in the United States Circuit Court of Appeals, and in the Supreme Court of the United States. The Court has prepared the form of your verdict as follows:

"We, the jury, find for the plaintiff, and assess its actual damages, exclusive of attorney's fees, at $_____. And if the Court be of the opinion that as a matter of law the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $_____ as a reasonable and just fee for the services proven.

_____

Foreman."

And thereupon the jury returned the following verdict:

"We the jury find for the plaintiff, and assess its actual damages, exclusive of attorneys' fees, at $10,880.00.

And if the Court be of the opinion that as a matter of law the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $7,500 as a reasonable and just fee for the services proven.

Foreman, WILLIAM MICKLER."

And thereupon the plaintiff, the Bucki Company, moved the Court to enter judgment against the Fidelity Company in favor of the plaintiff upon the said verdict for the full amount thereof, including the sum of $7,500, found by the jury as aforesaid, as a reasonable and just fee for the services rendered by plaintiff's attorneys in obtaining a dissolution of the said attachments. But the Court refused to include in the said judgment the said amount of attorneys' fees so found by the jury, to which refusal the Bucki Company ex-

cepted, on the ground that the plaintiff had a legal right to have the amount found due for attorneys' fees embraced in the said judgment.

And thereupon the Court, at the term aforesaid, rendered judgment against the Fidelity Company in the sum of $10,895.04. Each party reserved a bill of exceptions, and sued out separate writs of error from this judgment. The cases were heard together.

Among the errors assigned by the Bucki Company, was one relative to the action of the Court in refusing to enter judgment on the special verdict for attorneys' fees, and a majority of the Judges of the Circuit Court of Appeals being of the opinion that attorneys' fees were recoverable on the bond, it was ordered by that Court that the judgment of the Circuit Court be amended by striking out the words "Ten" and "Eight," and inserting the words "Eighteen" and "Three," thereby making the judgment against the Fidelity Company $18,395.04 instead of $10,895.04, and that the judgment be affirmed as amended. Rec. 140. A certified transcript of the record in this case is presented along with this petition, and it is prayed that it may be considered as a part hereof.

This opinion and judgment of the Court was concurred in by Judges Pardee and McCormick, and Judge Shelby filed a dissenting opinion, in which he expressed his concurrence with the view taken by the Judge of the Circuit Court in regard to attorneys' fees. The opinion of the Court (Rec. 145) and the dissenting opinion of Judge Shelby (Rec. 158) are contained in the record, and it is respectfully requested that they be read as part hereof.

The Action of the Appellate Court Presents This Important Question.

Did the Court of Appeals, in awarding attorneys' fees as part of the damages, give judgment in accordance

with the law as expressed in the opinion of this Court?

The Supreme Court of the United States has uniformly held that attorneys' fees cannot be recovered as damages.

Oelrich vs. Spain, 15 Wallace, 211.

And it was upon this ground that the Circuit Court refused to allow a recovery for attorneys' fees.

At the time these attachment bonds were given, there was no decision of the Florida Supreme Court relating to the subject, except that of Wittick vs. O'Neal, 22 Fla., 593, where the Supreme Court of that State, repudiating the doctrine of Oelrich vs. Spain, 15 Wallace, 211, held that attorneys' fees might be recovered as damages on an injunction bond.

The Supreme Court of Florida in that case did not treat the subject as one of local law, or as a matter of statutory construction, but as a question of general jurisprudence, or common law.

The case of Gonzales vs. DeFuniak Havana Tobacco Company, 41 Fla., 471, decided December 6th, 1899, over two years after the bonds were given by your petitioner, was an action upon an attachment bond, but the question of attorneys' fees for services rendered in defense of the attachment proceedings was not involved, and the declaration of the Court therein was a mere expression of opinion as to the weight of the common law authorities on the subject. (Page 477.)

Your petitioner will undertake to show in the brief filed herewith that this is purely a question of common law, or of general jurisprudence, and in no sense a question of local law or statutory construction, and that the doctrine of Oelrich vs. Spain, 15 Wallace, 211, was applicable to the question, and should have been applied by the Circuit Court of Appeals.

It is most respectfully submitted that it would be most just and highly proper for this court to revise the

judgment of the Circuit Court of Appeals in this case, through the medium of a writ of certiorari. There is at present a marked conflict on this subject between the decisions of this Court and the decision of the Circuit Court of Appeals, and until the decisions of the two tribunals are brought into harmony, there must always be great doubt as to the nature of the obligation of a surety on an attachment bond, a doubt which is accentuated by the dissenting opinion of Judge Shelby, of the Court of Appeals, and the conclusion of Judge Locke, of the Circuit Court.

The maintenance of uniformity among the decisions of the Federal Courts was one of the objects which Congress had in view when it devised the writ of certiorari, and its exercise for that purpose is highly advantageous to persons entering into contracts of this kind, and advantageous to the whole system of subordinate Courts. An authoritative declaration from the Supreme Court on this subject is of great importance to your petitioner, as well as to the many other surety companies, which together with your petitioner execute a very large number of attachment bonds in every State in the Union, and until this apparent conflict is settled, your petitioner and other sureties cannot know the exact measure of their responsibility, especially upon bonds given beyond the jurisdiction of the Circuit Court of Appeals for the Fifth Circuit. Surety companies being non-residents are in the large majority of cases entitled to have their liability adjudicated by the Federal Courts. This Court has already taken occasion to say:

"In the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under Section 6 for such supervision on our part as would tend to avert diversity of judgments, and guard

against inadvertence of conclusion in controversies involving weighty and serious matters."

In re Woods 143 U. S., 206.

And your petitioner points out that in this particular case your petitioner, at the time it executed the bonds, had the right to have the measure of its responsibility determined by the Federal Courts, and in accordance with the decisions of the supreme tribunal of that system, and without reference to a contrary decision of a Florida Court upon a question of general jurisprudence, or even a decision upon a local question, rendered after your petitioner's liability had attached.

As stated above, at the time these bonds were given, there was no Florida decision relating to the measure of damages on an attachment bond, and the only one now existent contains a mere dictum on that subject.

Wherefore your petitioner prays that this honorable Court may be pleased to grant a writ of certiorari in this cause, to the Circuit Court of Appeals for the Fifth Circuit, to bring up this cause for review and determination, and for such other and further proceedings as this Honorable Court may direct, and that an order may be entered staying the enforcement of the judgment against your petitioner pending the action of this Court.

R. H. LIGGETT,
Attorney for Petitioner.

STATE OF FLORIDA,
DUVAL COUNTY. ss.

D. U. Fletcher, of lawful age, being by me first duly sworn, says that he is a local director and agent of the Fidelity & Deposit Company of Maryland, the above named petitioner; that he has read the foregoing peti-

tion, and that he is informed and believes that the statements of fact therein contained are true.

D. U. Fletcher

Subscribed and sworn to
before me this 24
day of November, 1901.

Russell E. Calcord
Notary Public, State of Florida.

I hereby certify that I have examined the foregoing petition, and that in my opinion the same is well founded, and that the prayer of the petition should be granted by the Court.

R. H. LIGGETT,
Counsel for Petitioner.

No. [illegible]

In the Supreme Court of the United States.

Filed Jan. 10, 1902.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Petitioner,

vs.

THE E. BUCUS & SON LUMBER COMPANY,

Respondent.

OCTOBER TERM, 1901.

Brief for Petitioner on Application for Writ of Certiorari.

RICHARD E. LAGGETT,

Counsel for Petitioner.

In the Supreme Court

OF THE

UNITED STATES.

The Fidelity & Deposit Company of Maryland,
Petitioner,
vs.
The L. Bucki & Son Lumber Company,
Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

Attorneys' Fees Not Recoverable on an Attachment Bond.

In this connection it will be shown, that while the Florida statute has prescribed the form of an attachment bond, it has left the measure of damages upon such bond to be determined by the principles of the common law, and that according to the doctrine of the common law, as expounded by this Court, attorney's fees can no more be recovered upon an attachment bond than damages for injury to credit.

Section 1646 of the Revised Statutes of Florida provides as follows:

"No attachment shall issue until the person applying for the same, his agent or attorney, shall enter into bond, with at least two good and sufficient sureties,

payable to the defendant, in at least double the sum or debt demanded, conditioned to pay all costs and damages which the defendant may sustain in consequence of the plaintiff's improperly suing out said attachment."

The statute goes no further than to prescribe the form of the contract of indemnity to be given to the defendant in attachment, it does not undertake to fix the measure of damages, or to prescribe the effect of that contract, but leaves that to be determined by common law principles.

In this connection, Judge Shelby, in his dissenting opinion, has this to say:

"This statute creates no rule as to damages that would include counsel fees, and merely provides for the giving of a statutory recognizance, which is not the foundation of a right of action, but security only for the payment of damages. The damages referred to are such as are legally recoverable." Rec. 164, at bottom.

Or as said by the Supreme Court of Alabama in Hundley vs. Chadwick, 109 Alabama, text 105,

"The bond which the law requires for suing out an attachment is intended as an indemnity or security to the owner of the property attached, against an abuse of the process, and accords to him the same measure of relief against the principal and his sureties, in case it was wrongfully sued out, as he would have had or been entitled to, if the taking had been without pretense of legal authority."

That is to say, the measure of damages upon the bond is the same as in an action of trespass, except as to exemplary damages—which can never be recovered on a bond, and which are not claimed in the declaration.

The measure of damages in an action of trespass is regulated wholly by the common law—and it devolves

upon the Federal Courts to exercise an independent judgment in determining what that is. Said this Court in Lake Shore &c. Ry. Co. vs. Prentice 147 U. S. 106, in speaking of the allowance of *exemplary damages*: "This is a question, not of local law, but of general jurisprudence, upon which this Court, in the absence of express statute regulating the subject, will exercise its own judgment uncontrolled by the judgments of the Courts of the several States."

This is no less true of actual than of exemplary damages.

This Court, in Flanders vs. Tweed, 15 Wallace 453, has already held that attorneys' fees are not an element of actual damages in an action of trespass. That was an action of trespass for the illegal seizure of property, in which the plaintiff sought to recover the sum of $6,000 expended by him in the prosecution of sequestration writs for the recovery of the possession of his property. That case is decisive of the precise question involved here. There, Flanders, as the result of the trespass of Tweed, found it necessary to institute sequestration suits for the recovery of the possession of his property, and in a subsequent action of trespass against Tweed, it was held that he could not recover as damages the attorneys' fees paid out in the prosecution of those sequestration suits.

In the case at bar, the respondent asserts that it found it necessary to employ attorneys to secure the restoration of its property, and its release from the lien, and it claims the right to recover the amount of the attorneys' fees paid in this suit upon the attachment bond, which is virtually the same contention as as that made in Flanders vs. Tweed; and I assert that the obligation of the surety upon the attachment bond is not even so great as that of a defendant in an action of trespass; and if attorneys' fees cannot be regarded as an element of damages in the latter case,

they should not be deemed such an element in the former case.

The case of Oelrich vs. Spain, 15 Wallace, 211, is an instance of the application of this doctrine in a suit on a bond conditioned like the one in the case at the bar. There the condition of the bond was "To pay all costs, damages and charges that shall be occasioned by said suit." And it is worthy of note that the counsel who maintained the right to recover these fees contended as follows: "The claim here is founded on the *express terms* of the obligation, which is to pay, as well the costs, damages and charges, as shall occur in said Circuit Court, as *all costs, damages and charges as shall be occasioned* by said writ of injunction. These 'costs, damages and charges' superadded, are not referable to the Circuit Court, for they are specially provided for, and if they do not cover counsel fees, they are meaningless." Brief of counsel, pg. 223.

The Court held that attorneys' fees could not be recovered on the bond, and made the following observations:

"In actions of trespass, where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant, if the plaintiff be defeated. Why should a distinction be made between them? In certain actions ex delicto, vindictive damages may be given by the jury. In regard to that class of cases, this Court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended for counsel fees, but the amount of these fees cannot be taken as the measure of punishment, or as a necessary element in its infliction.'"

And the Court adds: "The point here in question has never been expressly decided by this Court, but it

is clearly within the reasoning of the case last referred to, and we think it is substantially determined by that adjudication. In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. * * * We think the principle of disallowance rests on solid foundation, and that the opposite rule is forbidden by the analogies of the law, and sound public policy.

Oelrichs vs. Spain, 15 Wallace, text 231.

The learned Judge who delivered the opinion of the Court below, calls attention to the fact that in the case of Oelrichs vs. Spain, there was no formal motion to dissolve the injunction, and that it was dissolved after a hearing on the merits. The Supreme Court, however, did not base its conclusion upon this circumstance, but laid down a general and broad rule, which would apply equally to a case where an injunction is dissolved upon formal motion, as well as to a case where an injunction is dissolved as the result of a decree entered at a final hearing, and it is impossible to perceive any greater reason for allowing attorneys' fees in the one case than in the other, for it is inconceivable that such a result should attend the filing of a mere motion.

There are two Federal decisions, and only two, which relate directly to the right to recover attorneys' fees upon an attachment bond, and in both of these the right to recover such fees was denied. The first is the case of Bing Gee vs. Ah Jim, 7 Fed. Rep., 812, in which the Court struck allegations of special damages resulting from the payment of attorneys' fees, and held that the word "costs" employed in the statute included only the statutory docket fee.

The second case is that of Jacobus vs. Monongahela Railroad, 35 Fed. Rep., 395, in which the Court carefully considered the subject of the allowance of attorneys' fees as damages on an attachment bond, and upon the authority of Oelrich vs. Spain held that they could not be recovered.

In Tiblier vs. Alford, 12 Fed. 262, which was an *action of trespass* for *malicious attachment*, counsel fees seem to have been treated as an element of damages.

Counsel fees were likewise allowed in Blunk vs. Atchison, etc. R. Co., 38 Fed. Rep., 317, which was likewise a case of malicious prosecution.

These cases do not apply to the case under consideration, and may be said to fall under the exception mentioned in Day vs. Woodworth, where it was held that attorneys' fees could be indirectly allowed as exemplary damages.

In Kennedy vs. Meacham, 18 Fed. Rep., 312, which was an action of trespass for wrongful attachment, founded on the Tennessee Statute, the Court held that attorneys' fees were not recoverable, page 313. It is to be observed that the Court instructed the jury in that case; that under the facts of that case, only actual and no punitive damages could be recovered.

The Federal Courts have consistently refused to allow counsel fees, not merely in actions at law, but also in Admiralty and Patent cases.

Arcombel vs. Wiseman, 3 Dallas, 306.
Margaret vs. The Connestoga, 2 Wallace, Jr., 116.

In this latter case, Justice Grier, while apparently admitting the discretionary power of the Admiralty Court to allow counsel fees, expressed his strong repugnance to its exercise, saying that the principal seemed to belong rather to the hall of the Cadi than to the judgment seat of the Court.

See also The Baltimore, 8 Wallace, 377.
Blanchard's G. T. F. vs. Warner, 1 Blatch, 258.
Stimson vs. The Railroads, 1 Wallace, Jr., 164.

Florida Decisions.

In the case of Wittick vs. O'Neal, 22 Fla., 593, the Supreme Court of Florida held that attorneys' fees could be recovered on an injunction bond, conditioned to repay *all damages* the defendant might sustain. This decision was founded on general reasoning, and the principles of general jurisprudence, and the Supreme Court of Florida admitted that its decision was at variance with the doctrine of Oelrich vs. Spain.

The case of Gonzales et al. vs. DeFuniak Havana Tobacco Co., 41 Fla., 471, was an action upon an attachment bond. The attachment bond had been given for the purpose of suing out an ancillary writ of attachment in an action of assumpsit, and in the suit upon the bond, it was sought to recover attorneys' fees expended in defending this action of assumpsit. The Court held that they could not be recovered. In passing upon the question, the Court said:

"By the great weight of authority, attorneys' fees and other expenses incurred in relation to an attachment, or in procuring its dissolution, will be allowed as damages in actions upon attachment bonds. The fees and expenses incurred in defending the principal suit cannot be allowed, in the absence of a statute, or a stipulation in the bond to that effect."

It will be observed that the Florida Court here views the subject of the allowance of attorneys' fees as part of the damages, as a question purely of general jurisprudence, and as one that is to be controlled by the rules of general law.

It is conceived that these two Florida cases show that this question is in no sense one of local law or statutory construction, and that it is a question purely as to what is, under the principles of the common law, the measure of damages upon an attachment bond.

Even though the question involved in this case had been directly drawn in question in the case last mentioned, and even though that opinion could be deemed a construction of the statute, or a deliverance upon a question of local law, it would not control the assessment of damages upon this bond executed before the decision in question was rendered.

"When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the State tribunals, Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued."

Burgess vs. Seligman, 107 U. S., text 33, 34.
Bartholomew vs. City of Austin, 85 Fed. Rep., 359.

But as previously pointed out, what is said in that case relative to the measure of damages upon an attachment bond is a dictum, and as such is not binding upon this Court.

No expression of opinion by a State Court upon a question of statutory construction or local law is binding upon a Federal Court, unless the matter of the opinion was expressed relative to some point which it

was necessary for the Court to decide, in order to grant the particular relief asked for in the case.

Carroll vs. Carroll, 16 Howard, 275, text 287.

Murray vs. Chicago and N. W. Ry. Co., 92 Fed. Rep., text 870.

Venice vs. Murdock, 92 U. S., 501.

"While Federal Courts follow the construction of a statute by the Courts of a State, they are not required to adopt a construction based on the implications of a judicial opinion."

Cæsar vs. Capel, 83 Fed. Rep., 403.

In the opinion of the Court of Appeals rendered by Judge McCormick, the learned jurist in effect contends that what would otherwise be deemed a dictum is relieved from that stigma by being expressed in the syllabi or headnotes of the case, and relies upon section 1327 of the Revised Statutes of Florida, wherein it is provided as follows:

"The Judge of the Supreme Court of this State delivering the opinion of the Court shall prepare and make a syllabus or statement of the points or principles intended to be decided by the Court, which shall be filed with the opinion and published in the reports at the beginning of the case, in lieu of that usually prepared by the reporter."

Unfortunately for the view expressed by the learned Judge, the Supreme Court of Florida, in the case of Hart et al. vs. Stribling, 25 Fla., 435, held as follows:

"Where the Judge who writes the opinion of the Court expresses a view upon any point or principle which he is not required to decide, his opinion as to such point is an *obiter dictum* and is binding upon no one."

As observed above, the Florida decisions treat this question of the measure of damages upon an attachment bond as one which is to be determined by the

principles of the common law, and the propriety of this is shown by the language of the statute which prescribes the form of the bond, and the history of the lsgislation on the subject in the State of Florida.

The Question is Not One of Local Law, or of Statutory Construction, but one of General Law.

The bonds sued on are in the ordinary form of a contract, and their construction is to be determined by the rules of the common law, and they may be enforced by suit, in any jurisdiction where the obligors may be found.

The case of Mulvane vs. Tullock, 58 Kansas 632, illustrates this idea. That was a suit brought in a State Court upon an injunction bond given in certain proceedings in a Federal Court, and as the bond was filed in a suit pending in the Federal Court, it was contended that the measure of damages on the bond must be controlled by the rules of law adhered to in that Court, and that under the doctrine of Oelrich vs. Spain 15, Wallace 211, attorneys' fees could not be recovered. But the Supreme Court of Kansas decided otherwise, and said:

"The bond executed is in the ordinary form, is in the nature of a contract; and the liability of the obligors depends not upon the Federal Constitution or Congressional Act, but on the proper interpretation of the bond itself. In the absence of a statute fixing the measure of damages, or limiting the recovery, we think the bond should be viewed in the light of an independent contract, and is to be interpreted by the general principles of the common law. It is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the Federal Court. Being an independent contract, and actionable in any

State where service upon the sureties could be obtained, the interpretation of the forum applies."

To the same effect:

Mitchell vs. Hawley, 79 Cal., 301.

Railroad Co. vs. Shipley, 1 Mo. App., 254.

8 Mo. App., 122.

The bond required in attachment proceedings is designed as a source of indemnity to the defendant, and the measure of damages in a suit thereof is the same as in an action of trespass, except as to exemplary damages.

Hundley vs. Chadwick, 109 Ala., text 105.

The measure of damages in the action of trespass was regulated wholly by the common law, and there is no statute which controls the subject. The measure of damages in a suit upon these bonds in a Federal Court, is to be determined according to that Court's notions of what the common law is.

Lake Shore &c. Ry. Co. vs. Prentice, 147 U. S., 106.

This Court has already determined that attorneys' fees are not recoverable as actual damages in an action of trespass.

15 Wallace, 453.

"The Judiciary Act declaring local laws rules of decision in Federal Courts, is limited in its application to laws strictly local, and the positive statutes of the State, and to the construction thereof adopted by the local tribunals, and to the rights and titles to things having a permanent locality, and does not extend to contracts and other instruments of a commercial nature."

Swift vs. Tysen, 16 Peters, text 18, 19.

As observed above, this bond constitutes a contract which may be enforced in any locality, and in any

jurisdiction, and does not come within the classification mentioned in Swift vs. Tyson.

"This Court determines for itself the construction of contracts without reference to the previous adjudications of a State Court upon the subject."

Pana vs. Bawler, 107 U. S., 529.

"This Court does not follow State Courts in their construction of a will, or of any other instrument, as they do in the construction of statutes."

Lane vs. Vick, 3 Howard, 471, approved in Barber v. Pittsburg &c. R'y Co., 166 U. S., 100.

It has been suggested that because this bond was executed in conformity with the provisions of a statute, that therefore the State decisions should control. If this contention needs refutation, it is found in the case of Lane vs. Vick, for the will therein construed was executed in conformity with a State statute, and the title to the land could not have been passed by the will in the absence of that statute, since the common law makes no provision for wills of real property; and moreover, the will affected property of a fixed and permanent character, and any suit founded upon such a will must have been local, whilst a transitory action may be maintained upon the attachment bond in any jurisdiction where the obligors are found.

In the Florida decisions quoted, there was no pretense that this was a local question, or that their conclusions were based on the statute. Neither ingenious counsel nor the learned Judge who delivered the opinion of the Court of Appeals, has undertaken to show by *reasoning*, that the question here involved is a local question, or that the decision of the Supreme Court of Florida is one of statutory construction. They have merely asserted the fact, and have not attempted to demonstrate its truth. In this connection I call attention to Venice vs. Murdock, 92 U. S.,

501, in which this Court said: "It is argued, however, that the New York decisions are judicial constructions of statutes of that State, and that therefore they would furnish a rule by which we must be guided. The argument would have force, if the decisions in fact presented a clear case of statutory construction, but they do not. They are not attempts at interpretation. * * * They assert general principles, etc." This language could be aptly applied to the decisions of the Supreme Court of Florida referred to.

In respect to the contention that this is a local question, enough has probably been said already, and the authorities heretofore cited are doubtless sufficient, but I call attention to the additional cases of Murray vs. Chicago and N. W. Ry. Co., 92 Fed. Rep., text 870, and Beard vs. Independent District of Pella City, 88 Fed. Rep., 376, which give a clear idea as to when a subject will be deemed a local question.

In the first named case, the Circuit Court of Appeals for the Eighth Circuit said: "For more than a century the Federal Courts, in the absence of a statute, or other obligatory rules of decision, have had recourse to the common law for rules of decision in the trial of cases in those courts, and have, in cases where that furnished an appropriate rule of decision, rested their judgment upon it."

In that case, the Court, following the Supreme Court of the United States, held that a cause of action founded upon a fraud was barred by the Iowa Statute of Limitations, because not especially excepted, and that the decision of the Iowa Supreme Court to the contrary was not binding, because not amounting to a construction of the statute.

In Beard vs. Independent District of Pella City, supra, an attempt was made to fasten a trust upon funds held by a Receiver of an insolvent bank, by virtue of a Statute of the State, and the Court held

that certain State decisions which declared that money received under the statute in question was a trust fund, and retained that character in the hands of a third party, were not to be deemed as a construction of the statute, as the statute did not deal with that question, but that the decision was founded upon principles of general law, about which the Federal Court would exercise its independent judgment.

The Decision of the Circuit Court of Appeals Finds No Support in the Language of the Bond.

The significant words of the bond are "costs and damages." The fact that the word *damages* would have been broad enough to embrace *costs* in its meaning, makes the use of the latter word significant, and shows that the Legislature used the word "damages" in a special and limited sense, and as applicable to some other class of damages than those to which the word *costs* is applicable.

The word "costs" is used to signify the expenses incurred by the defendant in the attachment proceedings, and the word "damages" is used with reference to the injuries sustained from the levy upon the defendant's property.

That the word "costs" cannot be deemed to include attorneys' fees is conclusively shown by the history of legislation in the State of Florida on that subject, and also by the well understood meaning which the word has. In 1828, the Legislature provided that "in all cases the party recovering judgment shall recover also his legal costs and charges, which shall be included in the judgment." And this provision has remained in force from that day to this, and appears as section 1304 of the Revised Statutes.

The words "costs and charges," used in this statute, have been uniformly interpreted during a period of

seventy-two years to embrace only the taxable fees of the officers of the Court, and have never been construed to embrace attorneys' fees, and at no time during the history of the State have attorneys' fees been allowed by statute to one party against another, except in certain special proceedings brought to enforce statutory liens and recover the value of stock killed by railroads, with the exception of the period between July, 1870, and March, 1873, when the New York Code was in force in Florida.

It is evident that the word "costs" is used in the same sense in the attachment bond as in the Act of 1828, and that it refers only to the costs which the defendant would have the right to have taxed in his favor in attachment proceedings. This is the generally accepted meaning of the word.

Anderson's Law Dictionary, 267.
Melancon vs. Robichaud, 19 La., 357.
Markham vs. Ross, 73 Ga., 105.
Apperson vs. Insurance Co., 38 N. J. L., 388.
Henry vs. Murphy, 54 Ala., 246.
McDonald vs. Page, Wright (Ohio), 121.
People vs. R. R. Co., 63 Hun., 632.

The fact that the word "costs" had a well-understood meaning, and that it does not include attorneys' fees, shows that the Legislature never contemplated them as being embraced in the terms of the obligation, for the Legislative mind having been directed to the subject of the expenses incurred in the defense of an attachment suit, and the fact that only taxable costs were provided for, excludes the idea that attorneys' fees were intended to be included within the meaning of the word "damages."

And it would seem to be clear that the Legislature intended to include in the meaning of the word "damages" such elements of compensatory damages only as

were then recognized by the common law as embraced in the measure of damages in an action of trespass.

The action having been removed from the State to the Federal Court, the law requires it "to proceed in the same manner as if it had been originally commenced in that Court."

Summing Up.

1st. At the time these bonds were given no decision had been rendered by the State Court relating to the measure of damages upon an attachment bond. The case of Wittick vs. O'Neal, 22 Fla., relating to the measure of damages upon an injunction bond, was decided upon general principles, and that decision is admitted by the Florida Court to be in direct conflict with Oelrich vs. Spain. All the Federal authorities existing at the time of the giving of the bonds were opposed to the allowance of attorneys' fees as damages upon an attachment bond.

2d. The decision of Gonzales vs. Tobacco Company, 41 Fla., was rendered after the attachment bond had been given, and subsequent to the institution of the suit upon these bonds, and what is said in that case in regard to the right to recover attorneys' fees incurred in the defense of attachment proceedings, is a mere *dictum*, and the expressions of the Court on this subject relate to what the Court conceived to be the rule under the common law, or general law, and the Court in that case did not attempt to construe the statute or to lay down a rule of local law.

3d. The statute does not undertake to prescribe the measure of damages, but leaves that to be determined according to the rules of the common law, and the bond required to be given was designed to secure to the defendant in attachment the payment of such damages as he would have been entitled to recover,

had the seizure of his property been without pretense of legal authority.

Under these circumstances judgment should have been rendered according to the doctrine of the Federal decisions, the authority of which has been denied upon the pretense that a local question was involved.

There was no State decision relating directly to this subject at the time these contracts were entered into, and even though a State decision bearing directly upon the subject, and amounting to a construction of the statute, had been rendered subsequently, still should judgment have been rendered in accordance with the doctrine of the Federal Courts.

Burgess vs. Seligman, 107 U. S., text 33, 34.

Bartholomew vs. City of Austin, 85 Fed Rep., 359.

The State decisions themselves treat this subject as a question of general jurisprudence, and it would be abhorrent to the doctrine that the Federal Courts are Courts of equal and concurrent jurisdiction, to disregard the views expressed upon this subject by the supreme tribunal of that system, and give judgment according to the notions of the State Court.

It is respectfully submitted that the Circuit Court and Judge Shelby, of the Circuit Court [illegible] were right in holding that attorneys' fee[s] [illegible] been disallowed, and that this Court sho[uld] [illegible] the authority of its decisions to be [illegible] refinement. It is likewise submitted th[at] [illegible] between this decision of the Circuit Cou[rt] [illegible] and the opinions of this Court, and the general importance of the question involved, call for a review of this judgment by the Supreme Court, and that a writ of certiorari should issue as prayed.

Respectfully submitted,

RICHARD H. LIGGETT,

Counsel for Petitioner.

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It is respectfully submitted that the Circuit Court and Judge Shelby, of the Circuit Court of Appeals, were right in holding that attorneys' fees should have been disallowed, and that this Court should not permit the authority of its decisions to be ~~talked away~~ dissipated by refinement. It is likewise submitted that the conflict between this decision of the Circuit Court of Appeals and the opinions of this Court, and the general importance of the question involved, call for a review of this judgment by the Supreme Court, and that a writ of certiorari should issue as prayed.

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